

TOWN OF KITTERY, MAINE  
BOARD OF APPEALS

APPROVED  
June 10, 2014

Members present: Vern Gardner, Craig Wilson, Brett Costa, Gary Beers, Niles Pinkham

Members absent: Brian Boyle

Staff: Heather Ross, Code Enforcement Officer

The meeting was called to order at 7:06 p.m.

Mr. Gardner advised the applicant there are only five members of the Board, therefore four like votes are needed for the application to be approved. The applicant agreed to continue.

Mr. Wilson noted Title 16.1.5.2.F.4 authorizes the Board of Appeals to hear the following Miscellaneous Variation.

ITEM 1: Jessica Regis, 76 Route 236, Map 28 Lot 26, Commercial-2, requesting a Miscellaneous Variation to the terms of Title 16 Section 3.2.11D in order to construct a 20'x25' addition.

Ms. Regis summarized her request. She explained she had a licensed daycare at this location for 4 1/2 years, but had to leave as it wasn't big enough. When the property was offered for sale, she decided adding an addition would serve her needs. The proposed addition will provide a safer access from Route 236 and allow an easier access to the back play area. The addition will sit back from the existing structure.

There was no public comment. The CEO provided:

1. This is a conforming lot with nonconforming structure located in the Commercial-2 zone.
2. Ms. Regis has proposed to construct a 20'x25' addition onto the existing building.
3. The C-2 zone requires a minimum 50-foot front yard setback.
4. The proposed addition would be less than the required setback, but no closer than the existing structure.
5. Joe Noel, Certified Soil Scientist, found the existing wetland to the rear of the property is less than 1-acre and is beyond the 50-foot required setback at 60 feet. The larger wetlands, greater than 1 acre, are separated by an old man-made roadway/trolley bed and there are no hydrologic connections to the smaller wetlands.

Mr. Beers: Has no issue with the application. He asked how the applicant arrived at the front setback dimension.

Ms. Regis: Through the state, they found the ROW for Rt. 236 was 100 feet. They measured 50 feet from the center of Rt. 236, and from that distance to the building was 8 feet.

Mr. Wilson, Mr. Pinkham and Mr. Costa had no issues.

Mr. Gardner asked about the wetlands. The CEO explained that the separation was done prior to the ordinance, otherwise it would be considered a filled wetland area. Joe Noel confirmed the two wetlands are no longer connected.

Mr. Pinkham moved to grant to Jessica Regis a Miscellaneous Variation to the terms of Title 16 Section 3.2.11.D in order to construct a 20'x25' addition closer to the 50 yard setback but no closer than the existing structure at 76 Route 236, Map 28 Lot 26, in the Commercial-2 zone.

Mr. Costa seconded

Motion carried unanimously

Findings of Fact

1. Jessica Regis provided information on the property, noting the need to increase the size of the structure to continue her daycare business which she had previously conducted in the existing structure.
2. This is a conforming lot with nonconforming structure located in the Commercial-2 zone.
3. Ms. Regis has proposed to construct a 20'x25' addition onto the existing building.
4. The C-2 zone requires a minimum 50-foot front yard setback. The existing building is located 8 feet from the property line
5. The addition will sit 16.6 feet from the property line. The proposed addition would be less than the required setback, but no closer than the existing structure.
6. Joe Noel, Certified Soil Scientist, found the larger wetlands, greater than 1 acre, are separated by an old man-made fill and a roadway/trolley and there are no hydrologic connections to the smaller wetlands. The smaller wetland area to the rear of the property is less than 1-acre and is beyond the 50-foot required setback at 60 feet.

Mr. Beers moved that Title 16.6.6, Basis for Decision, has been satisfactorily met for this application  
Mr. Costa seconded  
Motion carried unanimously

Conclusion

In accordance with Title 16.7.3.5.5 Nonconforming Structure Repair and Enlargement, the Kittery Board of Appeals has the authority to grant this Miscellaneous Variation, as the proposed expansion is no more non-conforming than the existing structure.

Mr. Gardner noted this approval is not the issuance of a building permit, and any aggrieved party has 45 days to appeal this decision to Superior Court.

Mr. Wilson noted Title 16.1.5.2.F.4.d authorizes the Board of Appeals to hear the following Special Exception.

ITEM 2: Patricia Melanson, 20 Moore Street, Map 24 Lot 57, R-V, requesting Special Exception Use to the terms of Title 16 Section 3.2.5C in order to operate a day care.

Mr. Beers: Questions whether this application requires Board review. A major home occupation in the R-V zone requires 13 or more children, where this application shows 12; and it must be subordinate to the principal use. The CEO described the use as 50/50 based upon the structure being a duplex where half is a dwelling and the other half will be used by the daycare center. 50/50 use is equal, one not being greater than the other. Another qualitative factor is the projected activity of the home occupation, as a traditional accessory use, which would be less than the dwelling unit. Based on this information, this could be considered a minor home occupation.

The CEO explained half the house is being used for the home occupation which she would consider a major home occupation. Mr. Wilson asked about the number of employees. The CEO suggested the Board could review the application as an Administrative Appeal and return to her for processing. Discussion followed regarding how much of the home occupation structure will be used for daycare, whether it equals 50%.

Mr. Gardner: With no objections, the Board will review this application as an Administrative Appeal. Board members had no objections.

Patricia Melanson: Clarified that the only area used is the first floor as the second floor is not high enough for use. The state licensing inspector is required to inspect areas where children are located, and did not go to second floor as it is used for storage and locked.

Jeremy Melanson: They will not be using the second floor. The daycare area will be used only 40-50 hours per week out of a total week of 168 hours. Fencing surrounds the day care area for safety.

Jackie Dow, neighbor: The Melansons have done a phenomenal job. The daycare couldn't be in a better place, as this is a perfect business for the area. She is extremely impressed with the fence and security measures. This is very positive and good for the neighborhood, and would appreciate a yes.

Theresa Davis, neighbor: There is not a lot of traffic. Much effort and expense has gone into this project. and she would love to see this daycare in the neighborhood. The Melansons are great people who deserve this start.

The CEO provided:

1. This is a conforming lot with a non-conforming structure located in the Residential Village zone.
2. Ms. Melanson has proposed a home occupation in order to operate a daycare for 12 children.
3. Though the use is a traditional use in the area, it was questionable whether the proposal would fit into the format of a minor home occupation and referred to the Board for determination.

Mr. Beers: Given the information provided and prior discussion he is prepared to move that this application does not meet the criteria of a major home occupation. Mr. Wilson agreed, noting it would be nice to have a definition of 50%.

Mr. Pinkham, Mr. Costa and Mr. Gardner had no further issues.

Mr. Beers moved to grant an Administrative Appeal of the CEO's decision for Patricia Melanson at 20 Moore Street, Map 24 Lot 57, R-V zone, to operate a daycare as a minor home occupation. A special exception use was originally requested, but the Board felt it was more correctly an Administrative Appeal.

Mr. Costa seconded

Motion carried unanimously

#### Findings of Fact

1. Patricia Melanson, 20 Moore Street, Map 24 Lot 57, R-V, originally requested a Special Exception Use to the terms of Title 16.3.2.5C in order to operate a day care.
2. It was determined by the CEO that this was a major home occupation.
3. Referencing Title 16.8.22.2 Minor Home Occupation Standards, the Board found there were 12 or less children; quantitative use of the property by the home occupation fell below 50%; minor home occupations allow up to 3 employees, and there will be only 2; projected activity of the daycare will be less than the adjacent residential use; .
4. Testimony was provided by Jeremy Melanson, spouse, who clarified the period of activity of the daycare.
5. Ms. Dow and Ms. Davis, neighbors, testified in support of the proposal.
6. Board discussion centered on whether this was a minor home occupation properly before the Board. With consent of the Applicant, Board review was changed to an Administrative Appeal.
7. The Board determined this was more correctly a minor home occupation

Mr. Pinkham moved to approve the Findings of Fact

Mr. Beers seconded

Motion carried unanimously

Conclusion

The Board found the proposal more correctly met Title 16.8.22.2 standards for a Minor Home Occupation than as a Special Exception Use and a Major Home Occupation (Title 16.8.22.3) and overturned the CEOs decision.

Mr. Beers moved to approve the Conclusion  
Mr. Pinkham seconded  
Motion carried unanimously

Mr. Gardner noted this approval is not the issuance of a building permit, and any aggrieved party has 45 days to appeal this decision to Superior Court.

Minutes: April 29, 2014

Mr. Costa moved to accept the minutes of April 29, 2014 as amended  
Mr. Wilson seconded  
Motion carried with 4 in favor and 1 abstention (Pinkham)

The CEO informed the Board that the School Board requested and received permission to hold their meetings in Council Chambers on the same evenings as the BoA in August. Chambers would be available on the first and third Tuesdays in August for the BoA.

Mr. Pinkham moved to adjourn  
Mr. Beers seconded  
Motion carried by all members present

The Board of Appeals meeting of June 10, 2014 adjourned at 7:55 p.m.

Submitted by Jan Fisk, Recorder, June 11, 2014